IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CARY HENDRICK, *et al.*, *Plaintiffs*, v. DONALD CALDWELL, *et al.*, *Defendants*.	Civil Action No.: 7:16-cv-00095 (GEC)

PLAINTIFFS' SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs' Counsel and Defendants' Counsel presented oral arguments regarding the Defendants' Motion to Dismiss the Complaint ("Motion") before this Court on September 15, 2016. During Plaintiffs' arguments, several questions arose regarding whether denying the Motion would implicate the constitutionality of Virginia and federal statutes on due process grounds concerning (1) gun prohibitions, (2) civil commitment of sexual offenders, (3) civil contempt proceedings for failing to comply with child support orders, and (4) narcotics possession.

Each of the four statutory schemes mentioned at oral argument differs materially from the Interdiction Statute in purpose and in application. Plaintiffs allege that they are afforded virtually no due process protections at the civil interdiction hearing, including the right to counsel. Once Plaintiffs are civilly interdicted, their arrest for the crime of alcohol possession is almost inevitable because of their disease (alcoholism) and status (homelessness). In the subsequent criminal proceeding when Plaintiffs do have a right to counsel, the Interdiction Statute does not permit Plaintiffs to challenge the basis for the civil interdiction order. Compl. ¶¶ 19, 141, 144; Pltfs.' Mem. at 38–39. Thus, as applied to Plaintiffs, the Interdiction Statute operates to make the civil interdiction hearing tantamount to their criminal trial.

In contrast, none of the four statutory schemes would be applied to persons who will almost inevitably be charged with a crime based upon a prior civil determination. Each of the other regimes also encompasses greater due process protections for the predicate determination that is an element of the crime than is afforded to Plaintiffs for the civil interdiction order that is the predicate determination of their criminal convictions. Consequently, a ruling by this Court to deny the Defendants' Motion will be distinguishable from any claims arising under those other statutes and will not implicate constitutional concerns in these other legal contexts.

II. STATUTES PROHIBITING CERTAIN PERSONS FROM POSSESSING A GUN

Both the federal and Virginia gun prohibitions are distinguishable from the criminal prohibitions in the Interdiction Statute because each gun prohibition statute (1) relies on prior determinations in which individuals received heightened or criminal due process protections, and (2) reflects a targeted legislative purpose of protecting the public from the dangers of weapons. *See* Gun Control Act of 1968, Pub. L. No. 90-618, § 101, 82 Stat. 1213–1214 (1968). For these reasons, finding that the Interdiction Statute violates Plaintiffs' due process rights would not call into question the constitutionality of any gun law.

A. Federal Gun Prohibitions

Federal law criminalizes the possession of firearms by individuals who have been adjudicated as mentally defective or committed to a mental institution. 18 U.S.C. § 922(g)(4)

(2012). To be "adjudicated as a mental defective," a court, board, commission, or other lawful authority (including a criminal court) must determine that the person is "a danger to himself or to others" or "lacks the mental capacity to contract or manage his own affairs." 27 C.F.R. § 478.11 (2016). To be civilly "committed to a mental institution," a court, board, commission, or other lawful authority must involuntarily commit a person to a mental institution. *Id.* In these adjudications, an individual must be given heightened due process. *Addington v. Texas*, 441 U.S. 418, 427 (1979). For example, Virginia follows this rule by requiring appointed counsel before it can civilly commit a person. VA. CODE § 37.2-814(C).

To be sure, the Supreme Court in *Addington* declined to extend criminal due process standards to civil commitment proceedings, but the reason was because "[i]n a civil commitment state power is not exercised in a punitive sense." *Id.* at 428. It was important to the Court that the State of Texas confined mentally ill persons "only for the purpose of providing care designed to treat the individual." *Id.* at 428 n.4. Moreover, the Court went on to hold that individuals must receive more due process than an ordinary civil case before being adjudicated as mentally ill. *Id.* at 426. ("Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least unclear to what extent, if any, the state's interests are furthered by using a preponderance standard in such commitment proceedings."). The Court concluded that "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." *Id.* at 427.

Addington highlights the significant differences between the Interdiction Statute and the federal gun prohibitions on persons adjudicated to be mentally ill. First, it is not almost inevitable that a person civilly committed to a mental institution or adjudicated as a mental defective will be incarcerated for possession a firearm. However, as alleged in the Complaint, once Plaintiffs are civilly interdicted their incarceration for the crime of alcohol possession is almost inevitable, making the civil interdiction commensurate to a criminal process and distinguishable from the civil commitment process. Second, in contrast to the civil commitment process which is focused on therapy, the incarceration of interdicted homeless alcoholics is punitive. *Id.* at 428. Plaintiffs here are not required to be offered treatment for alcoholism when incarcerated for violating interdiction orders. *See* Compl. ¶ 96. Plaintiffs' incarceration for violating interdiction orders also results in the inability to receive medications and health services for related medical conditions. *See* Compl. ¶¶ 61 and 86. Accordingly, the fundamental rationale in *Addington* for denying criminal due process—the absence of punitive state power—does not exist for the Interdiction Statute. Third, the ordinary civil preponderance standard used in the civil interdiction process does not even provide Plaintiffs with the heightened due process for civil commitment determination called for in *Addington*. Even if it did, the Interdiction Statute still would not satisfy constitutional due process, since Plaintiffs' interest in the civil interdiction proceeding is criminal in nature.

As to other groups of individuals prohibited from possessing a firearm, the federal law either requires proof of prior criminal convictions (for which criminal due process is required) or proof of the underlying facts concerning the individual's situation.[1] Neither kind of proof is required under the Interdiction Statute. In sum, neither *Addington* nor the federal scheme for

[1] *See* 18 U.S.C. § 922(g)(1) (2012) (convicted for a crime with a prison term exceeding one year); *id.* § 922(g)(2) ("a fugitive from justice"); *id.* § 922(g)(3) ("an unlawful user of or addicted to any controlled substance"); *id.* § 922(g)(4) ("adjudicated as a mental defective" or "has been committed to a mental institution"); *id.* § 922(g)(5) ("is illegally or unlawfully in the United States"); *id.* § 922(g)(6) ("discharged from the Armed Forces under dishonorable conditions"); *id.* § 922(g)(7) ("has renounced his citizenship"); *id.* § 922(g)(8) (subject to a restraining order issued by a court only after a hearing and a finding that the person demonstrates a "credible threat" to the safety of an intimate partner or child); *id.* § 922(g)(9) ("convicted in any court of misdemeanor crime of domestic violence").

prohibiting gun possession by identified groups of individuals supports denying criminal due process to Plaintiffs here.

B. Virginia Gun Prohibitions

Virginia law does not prohibit any person who "is a habitual drunkard *as determined by [the Interdiction Statute]*" from possessing or purchasing a firearm, although it does prohibit such persons from applying for a concealed handgun permit.[2] Virginia does prohibit other categories of individuals, as explained below, from possessing and/or purchasing a handgun. Other states in the Fourth Circuit—West Virginia, South Carolina, and Maryland—each make it a crime for persons who are either addicted to alcohol or habitual drunkards to possess a gun.[3] Each of those state statutes, however, apparently afford the right to counsel and other due process protections to those accused of the crime of unlawful possession. Under those statutes, to establish the applicable crime, the State must prove either that the defendant is addicted to alcohol[4] or has been previously criminally convicted of alcohol-related offenses.[5] Therefore, those states each provide criminal due process rights to anyone on all elements of these crimes. This illustrates the gap in Constitutional rights afforded to Plaintiffs under the Interdiction Statute, where only the possession element of the offense is subject to the due process protections of a criminal trial. If the Interdiction Statute in Virginia was structured like the firearm possession statutes in these other states, Plaintiffs would be afforded due process of law before being incarcerated. Without that structure, they are not.

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[2] *See* VA. CODE §18.2-308.09(9) (2016) (emphasis added).

[3] *See* W. VA. CODE § 61-7-7(a)(2) (2016) ("no person shall possess a firearm . . . who . . . *[i]s habitually addicted to alcohol*"); *see also* S.C. CODE § 16-23-30(A(1) (2016) ("It is unlawful for a person to knowingly sell, offer to sell, deliver, lease, rent, barter, exchange, or transport for sale into this State any handgun to . . . *a habitual drunkard* . . . .") (emphasis added); *id.* § 16-23-30(B) ("It is unlawful for a person enumerated in subsection (A) to possess or acquire handguns"); *see also* MD. CODE ANN. § 5-133(b)(4) (2016) ("a person may not possess a regulated firearm if the person . . . is *a habitual drunkard*) (emphasis added); *id.* § 5-205 ("[a] person may not possess a rifle or shotgun if the person . . . is *a habitual drunkard* as defined in § 5–101 of this title") (emphasis added).

[4] *See* W. VA. CODE § 61-7-7(a) (2016) (listing "habitually addicted to alcohol" as an element of the prohibition and explaining that violation of the gun prohibition is a criminal misdemeanor imposing either a fine between $100 and $1,000, imprisonment for ninety days to a year, or both); *see also* S.C. CODE § 16-23-50(A)(1) (2016) (listing "habitual drunkard" as an element of the prohibition and explaining that violation of the gun prohibition is a felony imposing either a fine not exceeding $2,000, imprisonment not exceeding five years, or both); *see also* MD. CODE ANN. § 5-205(d) (2016) (listing "habitual drunkard" as an element of the prohibition and explaining that violation of the rifle or shotgun prohibition is a criminal misdemeanor imposing either a fine not exceeding $1,000, imprisonment not exceeding three years, or both).

[5] *See* W. VA. CODE § 61-7-4 (2016) (explaining that being addicted to alcohol for purposes of meeting gun license registration requirements is "evidenced by either . . . [r]esidential or court-ordered treatment for alcoholism . . . or . . . [t]wo or more convictions for driving while under the influence or driving while impaired" within three years immediately prior to the application); *see also* MD. CODE ANN. § 5-205 (2016) ("[a] person may not possess a rifle

1. Mental Illness

Virginia law also prohibits individuals who are subject to a court judgment or order finding them to be mentally ill from possessing a firearm.[6] Each of the proceedings resulting in the court judgment or order provides individuals with greater procedural protections than in the general civil context.[7] Further, Virginia's gun prohibition laws not only permit individuals declared to be mentally ill the right to petition the court for reinstatement, but also explicitly outline specific standards for the courts' review and the appellate review process, which include a review of "the circumstances regarding the [mental illness] disability determination."[8] Further, the statutes reflect the state's concern regarding public safety as individuals prohibited under

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or shotgun if the person . . . is *a habitual drunkard* as defined in § 5–101 of this title") (emphasis added); MD. CODE ANN. § 5-101(l) (2016) ("'[h]abitual drunkard' means a person who has been found guilty of any three crimes under § 21-902(a) [driving while under the influence of alcohol], (b) [driving while impaired by alcohol], or (c) [driving while impaired by any drug, or combination of drugs and alcohol] . . . one of which occurred in the past year.").

[6] *See* VA. CODE § 18.2-308.1:1 (2016) ("acquitted by reason of insanity and committed"); *id.* § 18.2-308.1:2 (adjudicated "legally incompetent," "mentally incapacitated," or "incapacitated"); *id.* 18.2-308.1:3 ("involuntarily admitted to a facility").

[7] *See* VA. CODE § 18.2-308.1:1 (2016) (requiring criminal procedural protections); *id.* § 18.2-308.1:2 (legal competency or mental capacity adjudication requiring heightened procedural requirements such as appointment of a guardian ad litem); *id.* § 18.2-308.1:3 (requiring hearings and presentation of evidence for involuntary commitment proceeding); *see also id.* § 37.2-814(C) (requiring appointed counsel).

[8] *See id.*

these statutes must, through state specified procedures, be subject to a medical determination that they lacked capacity to, among other things, exercise judgment without assistance.[9]

2. Drug Offenses and Violent Felonies

Virginia laws that prohibit individuals who have previously been convicted for drug offenses or certain felonies from possessing firearms[10] are also distinguishable from the criminal portion of the Interdiction Statute. These laws only prohibit individuals who were adjudicated in criminal proceedings and, therefore, had all of the protections provided in the criminal context.[11] Further, these gun laws also provide reinstatement protections.[12]

3. Protective Orders

Virginia law also prohibits individuals who are subject to a court issued protective order from possessing a firearm.[13] The protective order context is distinguishable from the Interdiction Statute in its purpose because protective orders are a component of a state-wide initiative to identify, assist, and prevent domestic violence and family abuse.[14] Courts have recognized that the exigent circumstances present in the context of domestic violence should permit protective orders which do not require full due process.[15] Relatedly, courts have refused protective orders when the petitioner did not sufficiently plead a threat of imminent harm.[16] The Virginia gun prohibition on persons subject to protective orders relies on orders granted under statutory authority which requires a full hearing before a judge[17] or preliminary orders which explicitly require an affidavit or sworn testimony from an individual to support a finding of a "reasonable apprehension of physical harm," "family abuse," or "child abuse."[18] *See* VA. CODE § 18.2-308.1:4 (2016). Further, this law also provides time-specified reinstatement protections.[19]

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[9] *See e.g.*, VA. CODE § 19.2-182.2 (2016) (requiring evaluation to present defense of insanity in criminal proceedings referenced in § 18.2-308.1:1); *id.* § 64.2-2005 (2016) (requiring evaluation report for proceedings referenced in § 18.2-308.1:2 to declare someone mentally incapacitated); *id.* §§ 37.2-814, -805, 19.2-169.2 (requiring psychological evaluations to be introduced in commitment proceedings referenced in § 18.2-308.1:3).

[10] *See* VA. CODE § 18.2-308.1:5 (2016) (convicted of certain drug offenses); *id.* § 18.2-308.2 (convicted of enumerated felonies).

[11] *See id.*

[12] *See* VA. CODE § 18.2-308.1:4 (2016) (effectively expires upon expiration of the protective orders, which are granted for a maximum of two years); *id.* § 18.2-308.1:5 (statute establishes the prohibition for five years only).

[13] *See* VA. CODE § 18.2-308.1:4 (2016).

[14] *See e.g.*, OFFICE OF THE ATTORNEY GENERAL, 2015 REPORT: DOMESTIC AND SEXUAL VIOLENCE IN VIRGINIA, at 10–13 (2015), http://www.oag.state.va.us/files/2015_Annual_DV_SV_Report.pdf.

[15] *See e.g.*, *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 232 (Mo. 1982) (en banc) (rejecting due process challenge to statute that authorized ex parte orders to award custody and possession of the residence); *Marquette v.*

In summary, these characteristics make the Virginia gun possession laws significantly different from the habitual drunkard interdiction context. Further, gun possession laws are specifically tailored to the context of when an individual may be dangerous, *i.e.*, when the commitment or protective orders are in place. Once this threat expires, the statutes mandate specific procedures for reinstatement. In contrast, the Interdiction Statute has no statutory procedure for review or reinstating rights, thereby creating the effect of indefinitely labelling Plaintiffs as "habitual drunkards"—and exposing them to repeated incarceration—in perpetuity.[20]

III. VIRGINIA CIVIL COMMITMENT PROCEEDINGS FOR SEXUAL OFFENDERS

Granting Plaintiffs' due process claims would not call into question the constitutionality of Virginia's civil commitment process under the Sexually Violent Predators Act ("SVPA"). VA. CODE §§ 37.2-900 to -921 (2016). This Virginia civil commitment process is intended to address

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Marquette, 686 P.2d 990, 995–96 (Okla. Civ. App. 1984) (finding that an ex parte order did not violate the appellant's due process rights although it effectively denied visitation).

[16] *See e.g.*, *Blazel v. Bradley*, 698 F. Supp. 756 (W.D. Wis. 1988) (rejecting facial challenge to protective order statute, but finding order to be unconstitutional because the petition failed to allege a risk of immediate harm).

[17] VA. CODE §§ 16.1-279.1, 16.1-278.2, 19.2-152.10 (2016).

[18] VA. CODE §§ 16.1-253.1, -253.4, 19.2-152.8–.9, 20-103 (2016).

[19] *See* VA. CODE § 18.2-308.1:4 (2016) (gun prohibition effectively expires upon expiration of the full protective orders, which are granted for a maximum of two years, or emergency preliminary orders, which are granted for as little as three days and a maximum of fifteen days).

[20] VA. CODE § 4.1-333 (2016).

individuals who are "likely to commit future sexually violent offenses" as a result of a mental illness or personality disorder.[21] Individuals subject to the SVPA civil commitment process would not be able to rely on Plaintiffs' due process claim to challenge the application of the SVPA because (1) the SVPA civil commitment can only be used against persons that have been criminally convicted for committing a sexually violent offense or acquitted by reason of insanity; and (2) the civil commitment provisions of the SVPA provide heightened due process procedures. Individuals facing civil commitment are provided the right to counsel, to receive notice, to be present during the trial, to present evidence and cross-examine witnesses, to view all petitions and reports, and the right to have procedures requiring the clear and convincing standard of proof. *See* VA. CODE §§ 37.2-901 to -908 (2016). The SVPA also provides for procedures which ultimately revisit the underlying issues leading to the initial criminal proceedings.[22]

In contrast, the criminal portion of the Interdiction Statute unconstitutionally punishes Plaintiffs for violating the Interdiction Statute and offers no rehabilitative services for their condition. Defs.' Mem. at 26–27, 32, 43; Defs.' Reply at 8. In addition, the SVPA civil commitment statute mandates extensive procedures at the pre-petition, petition, and post-commitment phases, which effectively re-examine the basis for the initial criminal determination. *See Allen v. Illinois*, 478 U.S. 364, 369–371 (1986) (extending its holding in *Addington* to the civil commitment of sexual offenders because there is a rehabilitative purpose and the proceedings contain "strict procedural safeguards"); *see also Foucha v. Louisiana*, 504

[21] *See* OFFICE OF THE ATTORNEY GENERAL, *Sexually Violent Predators Civil Commitment Section*, http://www.oag.state.va.us/divisions/criminal-justice-public-safety/sexually-violent-predators-civil-commitment (last visited Sept. 21, 2016).

[22] VA. CODE § 37.2-908(D) (2016) ("In making its determination [that the individual is a sexually violent predator], the court may consider (i) the nature and circumstances of the sexually violent offense for which the [individual] was charged or convicted, including the age and maturity of the victim; (ii) the results of any actuarial test, including the likelihood of recidivism . . . .").

U.S. 71, 81–82 (1992) (finding statute which permitted commitment after finding individual was no longer mentally ill or posed a danger to the public to be unconstitutional). Defendants acknowledge that the criminal portion of the Interdiction Statute neither mandates nor permits such procedures. Defs.' Reply at 10–11.

IV. CIVIL CONTEMPT ORDERS FOR FAILURE TO COMPLY WITH CHILD SUPPORT ORDERS

Defendants suggested at oral argument that Plaintiffs' due process claims would mean that Virginia's child support enforcement laws would be unconstitutional. However, the Virginia statute that imposes criminal penalties for failing to provide child support makes no reference to the existence of a separate court order. This criminal statute states that "[a]ny parent who deserts or wilfully neglects or refuses or fails to provide for the support and maintenance of his or her child under the age of eighteen years of age . . . shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not exceeding $500, or confinement in jail not exceeding twelve months, or both[.]" VA. CODE § 20-61 (2016). Accordingly, a Commonwealth's Attorney would need to prove the operative facts—whether there is a noncustodial parent failing to provide for the support and maintenance of his or her child—and criminal due process protections would apply to the process of proving such facts. In contrast, the criminal provisions in the Interdiction Statute do not require the Commonwealth's Attorney to prove the operative facts—that a Plaintiff is a chronic alcoholic or even a "habitual drunkard." Instead, the comparable facts for Plaintiffs here are established in a civil procedure where criminal due process protections do not apply.

While section 20-115 of the Virginia Code provides for a civil contempt proceeding for non-custodial parents who have failed to pay child support, civil contempt differs from criminal prosecution. *Turner v. Rogers*, 546 U.S. 431, 441 (2011). A court may not impose punishment "in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order." *Hicks v. Feiock*, 485 U.S. 624, 638 n.9 (1988). Under the facts alleged in the Complaint and the standard in *Hicks*, Plaintiffs here could not be punished for civil contempt of civil interdiction orders since by virtue of their chronic alcoholism, they are "unable to comply with the terms of the order." Neither the Virginia legislature nor the Commonwealth's Attorneys should be permitted to circumvent the principle in *Hicks* by effectively criminalizing contempt of civil interdiction orders, thereby eliminating the constitutionally-required criminal due process protections afforded in the child support context.

Moreover, non-custodial parents subject to child support orders are not part of a class of individuals singled out for a status and whose behavior is rendered non-volitional by a disease. For these reasons, Plaintiffs' facts are distinguishable from those of non-custodial parents subject to Virginia's child support enforcement laws.

V. PROHIBITION OF NARCOTICS POSSESSION

For the same reasons as in the gun prohibition and civil commitment contexts described above, denying the Motion would not implicate the constitutionality of narcotics possession laws. Narcotics users receive criminal due process from the start. Rather than having previously legal but addictive behavior declared illegal due to their addiction, unprescribed narcotics use is a crime for everyone. This fundamentally differs from the Interdiction Statute in that the only thing that makes alcohol possession, a symptom of their disease, illegal for interdicted individuals is their status of being branded as habitual drunkards.

VI. CONCLUSION

The statutory regimes discussed at oral argument are materially dissimilar to the Interdiction Statute and, consequently, do not present the due process failures inherent in the statutory interdiction scheme and alleged in this case. Plaintiffs here are subject to interdiction in a civil proceeding without counsel or other criminal due process protections and then, as we have alleged, once interdicted in that civil proceeding, their incarceration becomes almost inevitable because of their homelessness and their disease of chronic alcoholism. None of the statutory schemes mentioned during oral argument involve a civil proceeding which, if it results in an adverse civil determination, inevitably leads to the incarceration of the individual as a criminal. The civil interdiction orders that are elements of the criminal Interdiction Statute provisions are not the results of prior criminal convictions for which criminal due process has been afforded. Nor are they determinations made for the therapeutic purposes that the Supreme Court has considered relevant in the civil commitment hearings for the mentally ill. In sum, if this Court upholds Plaintiffs' due process claim at this Motion to Dismiss stage of the proceeding it would not implicate any of the legal contexts raised during oral argument.

For these and the other reasons discussed in Plaintiffs' prior pleadings, Plaintiffs respectfully request that this Court DENY Defendants' Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2016, I electronically filed the foregoing Supplemental Brief in Opposition to Defendants' Motion to Dismiss with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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